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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 139

NICHOLSON TRANSIT COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Nicholson Transit Company, by its attorneys, Sparkman Deats Foster and Allan Barr Lutz, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above entitled case entered on February 6, 1951.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1255 (1). Jurisdiction of the

Court of Claims was based on Title 28, United States Code, section 1491 (1), (2) and (4).

United States Constitution and Relevant Parts of Statutes Involved

The Constitution of the United States, Amendment V provides in part: "* * * nor shall private property be taken for public use, without just compensation."

Section 902 of the Merchant Marine Act of 1936, as amended; the Act of June 29, 1936, c. 858, Title IX, § 902, 49 Stat. 2015 as amended Aug. 7, 1939, c. 555, § 3, 53 Stat. 1255; and Mar. 24, 1943, c. 26, § 3 (d), 57 Stat. 49; 46 U. S. C. § 1242 provides in part:

> *Requisition or purchase of vessels in time of emergency —Compensation; restoration, consequential damages*
>
> "(a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. * * * The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section."
>
> * * * * * * *
>
> "(d) In all cases, the just compensation authorized by this section shall be determined and paid by the

Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amounts as will be just compensation therefor, in the manner provided for by sections 41 (20) and 250 of Title 28." (Old Section 250 of Title 28 U. S. Code is now § 1491 of Revised Title 28 United States Code.)

Act of May 22, 1939, Chapter 140 Statutes at Large, 53 Stat. 752:

"Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section 3, subsection b, of the Act of February 13, 1925 (43 Stat. 936, 939, c. 229; U. S. Code, Title 28, sec. 288 b), be amended so as to read as follows:

"(b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. * * *

* * * * * * *

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

(This amendment and the statute amended by it were repealed by the Revised Title 28 United States Code, effective Sept. 1, 1948.)

New Section 1255 of Revised Title 28 United States Code, effective September 1, 1948:

"S. 1255. Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant, * * *"

Summary and Statement of Matter Involved

Petitioner seeks a review by this Court of a judgment of the United States Court of Claims entered February 6, 1951, for petitioner in the sum of $50,000.00 plus interest.

Petitioner was owner of the Great Lakes Steamship FLEETWOOD on June 17, 1942 when title and possession of said steamship were requisitioned by the respondent pursuant to Section 902 of the Merchant Marine Act of 1936 as amended. (F. F. 1, R. 4). The FLEETWOOD was 247 feet long, had a gross tonnage of 1593 and a net tonnage of 1124, (F. F. 3, R. 5) and, according to the Court of Claim's finding and according to the respondent's own audit, had operated during the five year period prior to requisition at an average annual net profit (after deducting overhead but not depreciation) of $56,386.27 (F. F. 8, R. 7-8). She also had a remaining useful life of sixteen years according to the finding of the Lower Court (F. F. 17, R. 14).

Petitioner rejected the $40,000.00 offered it by War Shipping Administration on March 26, 1944 on the grounds that approximately one year's earnings does not represent just compensation (Pl. Ex. 10, R. 226). On May 21, 1945, it accepted three-fourths of the amount offered, or $30,000.00, as provided in Section 902 of the Merchant Marine Act of

1936. Petitioner filed its petition in the United States Court of Claims on October 27, 1947 alleging the value of the FLEETWOOD on the date of requisition was $300,000.00, and seeking $270,000.00, the balance due as just compensation (after deducting the $30,000.00 already paid) plus interest (R. 3).

On May 10, 1950 the Commissioner appointed by the Court of Claims submitted his report, finding the value of the FLEETWOOD at the time and place of requisition was $107,700.00 (Report of Commissioner, R. 254). He did not deal with the question of interest as part of just compensation for the delay in payment.

The Court of Claims in its decision of February 6, 1951, without any discussion or stated reason therefor, reduced the Commissioner's value of $107,700.00 for the FLEETWOOD at the time and place of requisition to $80,000.00. It entered special findings of fact and conclusions of law and also filed an opinion. As a part of just compensation it added interest to its judgment for $50,000.00 (balance due on its $80,000.00 valuation after deducting $30,000.00 already paid) (Judgment, R. 19).

The Court of Claim's specific findings, its failure to make findings on material issues, and the facts will be briefly discussed in the brief submitted to this Court simultaneously with this petition.

Questions Presented

1. The Court of Claims having found a remaining useful life of the Vessel FLEETWOOD of sixteen years and an average annual net profit (audited by the respondent) on the FLEETWOOD's operation of $56,386.27 (after deducting overhead but not depreciation) for the five years prior to requisition, did the judgment of the Court of Claims deprive petitioner of its Constitutional right, under the Vth amendment, to just compensation for property taken in view of

respondent's requisitioning petitioner's vessel with only the payment of compensation as reduced by the Court of Claims and based on FLEETWOOD's valuation of $80,000.00 at the time of requisition?

2. Did the Court of Claims err in apparently disregarding entirely the average annual net earnings on the FLEETWOOD of $56,386.27 per year (after overhead but not depreciation) for the five year period prior to requisition, in view of the sixteen years of remaining life found by the Court and the Court's valuation of only $80,000.00 on the FLEETWOOD?

3. Did the Court's findings of evidentiary or primary facts fail to sustain the ultimate finding of the Court of Claims of $80,000.00 as the valuation of the FLEETWOOD at the time and place of requisition?

4. Will this Court, in reviewing a judgment of the Court of Claims, review the findings and evidence as the Reviser's Notes seem to imply (Reviser's Notes appear after new Section 1255 of Title 28, United States Code) in accordance with the Act of May 22, 1939, Chapter 140, 53 Stat. 752, which amended the Act of February 13, 1925, c. 229, Sec. 3b and 3c; 43 Stat. 936, 939 (repealed by the Revision and Codification of Title 28 U. S. Code effective September 1, 1948, cf. new Section 1255 of new Title 28 U. S. Code), and which provided among other things that this Court shall have authority to review the Court of Claims' judgment for errors assigned to the effect:

> (a) There is a lack of substantial evidence to sustain a finding of fact;
>
> (b) That an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; and
>
> (c) There is a failure to make any finding of fact on a material issue.

5. Did the Court err in failing to give effect to the general principle under the Constitution and Federal law that claimant for just compensation need not adapt any particular formula or any fixed basis of proving the value of the requisitioned property?

6. Was there a lack of substantial evidence to sustain the findings of fact by the Court of Claims to the effect that:

(a) The reproduction cost of the FLEETWOOD at the time and place of requisition was $650,000.00, instead of, as claimed by petitioners, a minimum of $1,008,000.00;

(b) The remaining useful life of the FLEETWOOD at the time of requisition was sixteen years, instead of, as claimed by petitioner, twenty-one years;

(c) The useful life of a vessel like the FLEETWOOD on the Great Lakes of fifty-five to sixty years, instead of, as claimed by petitioner, sixty years;

(d) No vessels closely comparable to the FLEETWOOD were constructed on the Great Lakes at or about the time of the requisition;

(e) The value of the FLEETWOOD at the time and place of requisition was $80,000.00, instead of, as claimed by petitioner, $250,000.00 to $300,000.00;

(f) That a considerable outlay for repairs to the vessel would be required to continue her operation for sixteen years on the Great Lakes.

Or if the other rule is now applicable, were the above findings of fact clearly erroneous in view of the evidence and other findings?

7. Did the Court of Claims err IN FAILING TO MAKE ANY FINDING OF FACT on the following material issues:

(a) The effect in reduction of valuation or in reduction of useful life, if any, of her claimed operation in salt or "brackish" water until 1915 or 1916;

(b) How much of the amount spent by respondent in "repairing, altering and converting" after requisition was necessary to put the FLEETWOOD in satisfactory operating condition;

(c) The cost of making the repairs to the FLEETWOOD which petitioner would have needed to make in the year or two immediately after the requisition in order to continue her in operation on the Great Lakes in her customary trade for her remaining useful life of sixteen years also during the remaining sixteen years;

(d) How much of the $394,472.61 spent in "altering, repairing and converting" by the respondent after requisition was for converting the FLEETWOOD for wartime use by respondent in the coal trade on the Atlantic Coast immediately after requisition;

(e) The value of the FLEETWOOD at the time of requisition if in good sound operating condition, *i. e.*, before deducting cost of necessary repairs;

(f) The annual rate of depreciation of a vessel in operation on the Great Lakes of approximately the age, type and condition of the FLEETWOOD and the percentage to be deducted from reproduction cost of the FLEETWOOD in using this method of computing value.

8. Did the Court of Claims fail to apply the test of what a willing buyer would pay a willing seller for the FLEETWOOD?

Reasons for Granting the Writ

1. The decision below of the Court of Claims presents problems of difficulty and *importance in the practical application of the general standard of just compensation under Section 902 of the Merchant Marine Act of 1936, as amended.* Because of the six year statute of limitations on this type of litigation, a number of just compensation claims are still being litigated arising out of the Government's requisition of ships during World War II under Section 902. Also, a check of cases now pending in the Court of Claims for

just compensation for vessels requisitioned for title or use shows sixty-five still pending. In addition, approximately *twenty-five* ship requisition cases are reported to be pending in other Federal Courts against the United States Government. If a new program of requisitioning of vessels becomes necessary in the present emergency, it will probably take place under Section 902, and considerable additional litigation would then result. It is desirable to have the statute clarified and interpreted by an Appellate or Review Court. This Court has deemed it advisable to issue several writs of certiorari to the Court of Claims involving questions of interpretation of this statute in the last several years.

The question concerning the effect of earnings and the Lower Court's virtual refusal to give serious consideration to them is likely to arise in many other cases now pending. This is especially true since the Court of Claims has in the past pointed out its serious doubts as to the cost of replacement depreciated as a measure of value.

2. The questions here are of a general nature and of importance in connection *with interpretation of the Constitutional right to just compensation* as interpreted by the Federal Courts.

3. This case involves the construction and application of a Federal Statute (Section 902 of the Merchant Marine Act of 1936, as amended. Text supra page two) and warrants further consideration.

4. It is petitioner's view that it has been deprived of its Constitutional right to just compensation (under the Vth Amendment) by the amount and manner in which the Court of Claims has determined the value of the FLEETWOOD in view of the evidence and also in view of the Court's own findings.

5. Since there is no higher Court having supervisory powers over the Court of Claims except this Court, and since the Court of Claims is handling a substantial amount of litigation involving just compensation for vessels requisitioned, this Court in this case should exercise its supervisory powers, whereas it might not in another case where a Court of Appeals has already reviewed a Trial Court's judgment.

6. There is here no concurrence of two Lower Courts in their findings of fact. The Court of Claims did not hear and see the witnesses. Its conclusion reducing the value of the vessel by more than 20% under the Commissioner's finding from $107,700.00 to $80,000.00 was a finding in effect contrary to the Commissioner's finding. Yet it was the Commissioner who heard and saw the witnesses. This Court therefore should not be reluctant to review the findings of the Court of Claims.

7. The Court of Claims has erroneously interpreted the prior decision of this Court in *Toronto, Hamilton & Buffalo Navigation Company* v. *United States,* 338 U.S. 396, to mean that it, as a Trial Court, must virtually ignore past vessel earnings as a substantial element in proving present value even though the proofs show that said past earnings tend to reflect probable future returns.

8. The decision below in principle is in conflict with prior decisions of this Court and of the Circuit Court of Appeals which indicate that no one fixed basis or formula need be followed by a claimant in proving the value of property taken in just compensation proceedings and also with the principle that earnings are an important factor to be considered in determining value.

9. Despite the Revision and Codification of Title 28, United States Code approved June 25, 1948, effective September 1, 1948, of the statutory provisions for Writs of Certiorari to the Court of Claims, this Court still may re-

view decisions of the Court of Claims where the following grounds exist:

(a) Lack of substantial evidence to sustain a finding of fact;
(b) Ultimate finding or findings not sustained by the findings of evidentiary or primary facts; and
(c) Failure to make any finding of fact on a material issue.

Petitioner contends all three of these grounds exist here. If the above rules are no longer applicable, then the "clearly erroneous" findings of the Court of Claims should be reviewed here.

10. As indicated by "Questions Presented" supra, page seven, No. 7, the Lower Court made no finding at all on several fact questions important and necessary to an ultimate finding of value of the FLEETWOOD.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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Of Counsel

JUNE 22, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 139

NICHOLSON TRANSIT COMPANY,
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v.

THE UNITED STATES,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the United States Court of Claims in this cause appears in the Record in this Court at page 15, Court of Claims Case No. 48,020. Opinion apparently not yet officially reported. Unofficially reported at 1951 American Maritime Cases 561.

Grounds of Jurisdiction

Set forth in Petition for Writ of Certiorari page 1.

Statement of the Case

A summary of the proceedings below appears at page 4 of the Petition to which this brief is attached and for

brevity will be omitted here. However, the facts and findings are not summarized in the Petition.

Facts

The FLEETWOOD was a single screw bulk carrier, of steel hull, built on the Great Lakes by the Superior Shipbuilding Company in 1903. Overall length 247 feet, breadth 41 feet, depth of 18 feet 1½ inches, gross tonnage 1593 and net tonnage 1124 (FF. 3, R. 5).

The testimony shows the vessel was equipped with large hatches 65 feet in length especially so constructed for the handling of iron and steel products (R. 5). Her carrying capacity was 2,500 tons, exclusive of bunkers and stores (FF. 7, R. 6). Because of her 65-foot hatches and low sides, she could be loaded and unloaded more quickly and more economically than a larger vessel having a deeper draft and higher sides and without tug assistance. She was small enough to pass through the Welland Canal and her shallow draft enabled her to reach steel mills and docks where there was very little water (FF. 7, R. 7).

When requisitioned, June 17, 1942, she held a Coast Guard Certificate of Inspection for navigating one year beyond April 30, 1942 on the Great Lakes (FF. 10, R. 8), and a current rating with the American Bur[illegible]u of Shipping, which, on April 9, 1942, issued a Certificate stating that the FLEETWOOD had been inspected by its surveyors and was reported to be in good and efficient state and fit for Great Lakes service (FF. 10, R. 9).

A recapitulation of the income and expenses for four of respondent's vessels including the FLEETWOOD as determined by respondent's auditor (FF. 9, R. 8) is in evidence as Pl. Ex. 16 (R. 242A). During the five years just prior to requisition the FLEETWOOD was operated an average of 229 days per season and with an average annual net profit, after deducting overhead but not depreciation, of $56,386.27.

After deducting depreciation this was $52,075.84 (FF. 9, R. 8) (Pl. Ex. 16, R. 242A).

The respondent requisitioned the FLEETWOOD for the purpose of using her as a coal carrier between ports on the Atlantic Coast. Promptly after obtaining the vessel, respondent delivered her to the Nicholson Terminal and Dock Company for conversion to such service on the Atlantic Coast under the direction of representatives of the War Shipping Administration and under plans prepared by the architectural firm of Gielow & Co. (FF. 13, R. 10).

With the exception of the main condenser, the engines and most of the mechanical equipment of the FLEETWOOD were in good condition at the time of the requisition (FF. 14, R. 11). However, due to hauling rough cargo, the hull structure in places was damaged and distorted and in need of repair (FF. 14, R. 11). The Court found and there was some evidence that there were bends, indentations and cracks in some places, "in spots" frames broken, stringers bent and distorted, etc. (FF. 14, R. 12). But there was no evidence that these would prevent her continuance in her rough trade, nor as to approximate cost of necessary repairs of these particular items.

The War Shipping Administration spent in converting and repairing this vessel to ocean service under its contract with Nicholson Terminal & Dock Company the sum of $304,472.81 (FF. 15, R. 12). A number of the repairs which the respondent ordered were necessary for operating the vessel on the Atlantic Coast but would not have been required if she had remained in use on the Great Lakes. Part of the expense allocated under the heading of "Repairs" was attributable to the demand of respondent's representative that all portions of the machinery and equipment be opened up for inspection to determine the extent of wear on the various working parts. A considerable portion of the work, which was designated and paid for

by the respondent as repairs, arose in connection with the drydocking of the vessel and repairing the hull structure at that time. While repairs to the hull structure were necessary to place the vessel in sound condition, the cost of this work and of drydocking the vessel could have been deferred by petitioner until December 31, 1943. (FF. 16, R. 13). There is no finding of the cost of necessary repairs, and no estimate thereof in the Record. No particular effort was made to keep an exact distinction between repairs and alterations (FF. 15, R. 13).

Just prior to the time she was requisitioned, the FLEETWOOD had discharged a cargo brought in from a port on the Great Lakes. She was sufficiently seaworthy that she could have continued in operation on the Great Lakes for the remainder of the navigating season of 1942 with no repairs, except such as were customarily made by petitioner during each operating season (FF. 16, R. 13).

The FLEETWOOD could have continued to operate on the Great Lakes in the usual trade at the time she was requisitioned without unusual repairs. Witness Papworth, who was superintendent of the engineering division of Nicholson Terminal & Dock Company from the Fall of 1934 until after the reconversion work on the FLEETWOOD was completed and had intimate knowledge of the FLEETWOOD, testified that none of the so-called repairs would have been necessary to continue operations on the Great Lakes (R. 109). Mr. C. H. Lincoln, for thirty-five years in charge of the Detroit office of the American Bureau of Shipping (R. 59) and who personally surveyed the vessel for class in 1942 (R. 63), testified that the FLEETWOOD was, when issued her certificate April 9, 1942 (Pl. Ex. 6) in all respects seaworthy for operation in her class on the Great Lakes (R. 62). The expense of drydocking was necessary because she was being taken off of Great Lakes services and being put into ocean service (R. 13). The point is, petitioner's proof showed no

major repairs were necessary for Great Lakes operation. Respondent tried to prove extreme repairs were necessary but did not show the cost of such repairs as were necessary for continued rough use on the Great Lakes.

There were no sales of vessels comparable to the FLEETWOOD sufficiently near the date of the requisition to establish a market price for such vessels (FF. 19, R. 14).

The useful life of a Great Lakes ship such as the FLEETWOOD is 60 years, according to the testimony of all the witnesses familiar with conditions there: Lincoln (R. 65), Papworth (R. 128), and Christensen (R. 209), all with long experience and familiarity with Great Lakes ships, and the Witnesses Lincoln and Papworth with intimate knowledge of the FLEETWOOD. The lower Court found it to be 55 to 60 years (FF. 17, R. 14).

With a seven to seven and one-half month season of operation a ship does not get the wear and tear that a ship does if operated a full season or for twelve months (FF. 17. R. 14). A 60-year life would give the FLEETWOOD (built in 1903) a remaining useful life at the time of requisition (1942) of 21 years. The Court found it to be 16 years (FF. 17, R. 14) "with a considerable out-lay for repairs."

If the FLEETWOOD's annual net earnings of $52,075.84 (after depreciation and overhead) were capitalized on the basis of a 15% annual return, this would give a value for the FLEETWOOD in excess of $300,000.00. The testimony of an investment expert, excluded by the Commissioner but "looked over" by the Court of Claims, shows that the earning capacity of a vessel is an important factor in determining the value of the vessel (R. 18). But the lower Court virtually ignored it.

Mr. Christensen had had 25 years' experience with shipbuilding on the Great Lakes, the only such witness in the case (R. 205). His estimate of cost to reproduce for private use a single ship of the type most comparable to the FLEET-

WOOD built on the Great Lakes in 1942 was between $1,250,000.00 and $1,500,000.00 (R. 210). These N3s were the most comparable to the FLEETWOOD of any vessels built during that period, as testified to by the respondent's expert witness Sturm (R. 173). Sturm testified that $1,008,000.00 was the cost of one of these N3s.

These vessels were constructed in accordance with plans prepared by the Maritime Commission at a cost of $1,339,477 each (FF. 20, R. 15).

The petitioner offered testimony by Mr. Badger (R. 212) giving his opinion as an investment expert that the FLEETWOOD was worth $358,527 (R. 217). The Commissioner refused to admit this testimony, but the Court "looked it over" (Opinion, R. 18).

Despite its finding of a 16-year remaining useful life and average annual net earnings of $56,386.27, the Court found a value of $80,000.00 for the FLEETWOOD. The Commissioner's Report had found $107,700.00. (This must have been based on the cost of repairs, but there is no finding on the cost of repairs.)

Specification of Assigned Errors

See "Questions Presented" in Petition, p. 5.

ARGUMENT

I. The writ should be granted because of the general importance of the problems presented in the application of the general standard of just compensation to requisitioned vessels and the volume of pending cases for just compensation. The case involves deprivation of petitioner's constitutional right to just compensation without adequate findings below in support of the Court's valuation. There is no concurrence of two lower courts.

This case involves just compensation for a vessel requisitioned on June 17, 1942 under Section 902 of the Merchant

Marine Act of 1936 as amended (46 U.S.C. § 1242). (See pertinent text p. 2 Petition.)

The Department of Justice has available the more accurate figures, but we are informally advised there are now approximately sixty-five cases still pending in the United States Court of Claims involving requisition of title or use of vessels by the Government under Section 902 of the Merchant Marine Act of 1936 as amended. About twenty-five similar cases are said to pend in other Federal Courts.

Thus the questions here involved are likely to arise again and are of importance for future determinations by the Court of Claims of just compensation. The question of the Court of Claims' virtual refusal to consider earnings even though they are vital as in this instance on the question of value is likely to arise frequently in the future in those pending cases before the Court of Claims.

This Court has several times recently granted certiorari to review determinations of the Court of Claims on the standards governing just compensation for requisitioned vessels. *U. S.* v. *Richard S. Cors,* 335 U. S. 810 (No. 132); *U. S.* v. *Toronto, Hamilton & Buffalo Navigation Company,* 336 U. S. 965 (No. 624). In the *Toronto, Hamilton & Buffalo* opinion on the merits, 338 U. S. 396, this Court stated:

> "We brought the case here on certiorari, 336 U. S. 965, because it presents problems of difficulty and importance in the practical application of the general standard of just compensation." (p. 398.)

One of the main points criticized there apparently was reliance by the Court of Claims on earnings *10 years prior to requisition.* In this Court's consideration of the merits of the *Richard S. Cors* case, 337 U. S. 325, Mr. Justice Frankfurter's dissent states:

> "We brought this case here on certiorari to the Court of Claims under 28 U. S. Code, sec. 1255 (1) because it

seemed to present constitutional issues important in the award of compensation for vessels requisitioned by the Government during the recent national emergency under Sec. 902 (a) of the Merchant Marine Act of 1936." (pp. 336-7.)

The *Cors* case was reversed and remanded by this Court, 337 U. S. 325, 336. The *Toronto, Hamilton & Buffalo Navigation* case also was reversed by this Court, 338 U. S. 396, 407.

Citizens under this requisition statute are deprived of their property subject to the sole determination of compensation by the Court of Claims, without review except where this Court intervenes. No other Court exercises supervision over its determinations. It is therefore important that this Court scrutinize with more than usual care the determinations of the Court of Claims under the requisition statutes.

This is especially true since the Court of Claims is determining the litigant's Constitutional right to just compensation in those cases. Incidentally, in each of the cases just referred to above, the Court of Claims' final determination after reversal by this Court could be interpreted virtually to be a reaffirmation of their original judgments. (In the *Cors* case the first opinion found value of the McArthur at $15,500.00 (75 F. Supp. 235, 239); while the second judgment was based on the same value of $15,500.00 (96 F. Supp. 460). In the *Toronto, Hamilton & Buffalo* matter, the first valuation for the Maitland No. 1 was $161,833.72 (81 F. Supp. 237, 245); whereas the second valuation by the Court of Claims was $142,500.00 (88 F. Supp. 1016, 1022).) The Government claimed it was worth $72,500.00 (81 F. Supp. 237, 238).

There is in the case at bar no concurrence between two lower Courts. The Court in determining $80,000.00 as the just compensation in effect reversed the Commissioner's

finding of $107,700.00 without explanation or finding to support the change. The Court of Claims did not hear and see the witnesses. Therefore this Court should not be reluctant to review its findings, especially where not supported by the evidence and its other findings.

The present judgment of the Court of Claims highlights a tendency to enter judgments not adequately supported by findings of fact, perhaps on the theory that the Court of Claims determinations have a status similar to a jury's verdict. Since this Court can now review the evidence before the Court of Claims, and since the new Title 28 of United States Code, Section 1255, probably placed reviews of the Court of Claims in the same status as any review of a Trial Judge's findings without a jury, this theory would no longer seem tenable. Especially since the Court of Claims itself does not see and hear the witnesses. The scope of this Court's review therefore should now be akin to the old equity review.

In the case at bar the lower Court's decision in effect is in conflict with the principle of prior decisions of this Court indicating that no one fixed basis or formula need be followed by a claimant in proving the value of property taken by condemnation (*United States* v. *Miller*, 317 U. S. 369) and also with the principles enunciated by this Court that earnings are an important factor to be considered in determining value (*Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312). This will be discussed further in the next point on earnings.

II. The writ should be granted because the Court of Claims' determination conflicts with the principle of prior decisions of this Court and also it erred in misinterpreting this Court's opinion in Toronto, Hamilton & Buffalo Navigation Company v. United States, 338 U. S. 396. The Court of Claims virtually ignored entirely the earnings of the

Fleetwood as an important factor in determining value, in view of its finding since it found a 16-year remaining life and average anual earnings of $56,386.27 and yet a value of only $80,000.00 for the Fleetwood.

We assume it is still a general principle that no one fixed method or basis of computing value is required or decisive where a free and open market for ships does not exist to establish fair market value.

In *United States* v. *Miller,* 317 U. S. 369, this Court said (pp. 373-4):

> "It is conceived that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that *no general formula should be used for the purpose.* * * * Where for any reason property has no market, resort must be had to other data to ascertain its value. * * * (Italics ours.) (pp. 373-4).

While it is true that earnings are not necessarily controlling, they should not be ignored where they tend to reflect future returns.

This Court in the case of *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, stated in part as follows:

> "* * * *The value of property,* generally speaking, *is determined by its productiveness—the profits which its use brings to the owner.* * * * Demand for the use is another factor. * * * The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its value. * * *" (Italics ours.) (p. 328).

The Court of Claims itself in *Willow River Power Co.* v. *United States,* 101 Court of Claims 222, stated as follows:

> "Among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost by reason of the reduction of power caused by the backing up of water into the tailrace" (p. 230).

In discussing what a prospective buyer would consider in determining the value of stock, the United States Board of Tax Appeals stated in *Mathilde Hooper, Administratrix, Docket No. 85776,* 41 U. S. B. T. A. 114:

> "In our opinion the factor which we would consider as the most important would be what the stock would earn" (p. 129).

In *Brainerd* v. *State of New York,* 74 Misc. (N. Y.) 100, a case involving condemnation of real estate, the Court stated as follows:

> "* * * It is well known that the income from property is one of the chief facts relied upon by prospective purchasers of real estate. * * *" (p. 112).

In the case of *Puget Sound Co.* v. *City of Puyalup,* 51 F. (2d) 688 (C. C. A. 9), the Court stated:

> "Market value is dependent upon earning capacity and fluctuates with that capacity" (p. 690).

Thus the judgment below in virtually ignoring the earnings of the FLEETWOOD conflicts in principle with the principles enunciated by this Court and the Federal Courts generally (see *Ozanic* v. *U. S.,* 165 F. (2d) 738) to the effect that no one formula or basis is required to be followed in proving value. The findings below show the Court of Claims relied almost entirely on cost of reproduction depreciated. The decision below also conflicts with the principle enunciated by this Court that demand and earnings are important.

Also, it is respectfully submitted the lower Court must have misinterpreted this Court's decision in *Toronto, Ham-*

ilton & Buffalo v. *United States,* 338 U.S. 396, to mean earnings are wholly unreliable and of slight significance in determining value. We submit that is neither the law of this Court nor is it so held in the *Toronto, Hamilton & Buffalo* case.

It is true that in that case the Court discussed earnings as follows:

> "And past earnings are significant only when they tend to reflect future returns. We see no relevance in the MAITLAND'S earnings between 1916 and 1932 on the issue of capacity to earn after 1942, on the Great Lakes or elsewhere. On this record they are entirely too remote to bear on the vessel's value when taken." (p. 403).

Thus it appears the Court of Claims had considered earnings from 1916 through 1932, ending ten years prior to requisition. The Court of Claims had stated:

> "In view of all these circumstances we are compelled to resort to a consideration of the earnings of the MAITLAND No. 1 during the time that the vessel was actually operated as a car ferry. * * *" (81 F. Supp. 237, 244).

In view of the special adaptability of the FLEETWOOD shown by the Court's findings and need for such a type of vessel on the Great Lakes, and the fact that she could not be replaced out of available fleets as shown by the testimony, it is clearly indicated that she had a very substantial value to a prospective, willing buyer far beyond the $80,000.00 found by the Trial Court.

The FLEETWOOD was in actual operation at the time of requisition, and her average earnings for the five years just previous to requisition of $56,386.27 indicated a very substantial value. Under such circumstances these earnings definitely "tend to reflect future returns." It was wholly unrealistic for the Court to determine her value at $80,000.00.

III. The scope of review by this Court of the findings of the Court of Claims should now be clarified since the new Title 28 U. S. Code repealed the controlling statute, the Act of February 13, 1925, Chapter 229, Statutes at Large 1925, Section 3 (b) and 3 (c) as amended by the Act of May 22, 1939, Chapter 140, 53 Stat. 752. This Court should now hold applicable the old equity scope of review. The Court of Claims does not see and hear the witnesses. Review under the new Title 28 U. S. Code, Section 1255, should be unrestricted as indicated in the reviser's notes.

The statute governing the scope of review by this Court of the judgment and findings of the Court of Claims, the Act of February 13, 1925, Chapter 229, Statutes at Large 1925, Section 3 (b) and (c), was amended on May 22, 1939, to broaden said scope in the following language:

> "* * * In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

The Act of May 22, 1939, Chapter 140, 53 Stat. 752.

In the Revision and Codification of Title 28 of the U.S. Code, approved June 25, 1948, effective September 1, 1948, this statute as so amended was repealed.

Replacing the aforesaid statutes is new Section 1255 of new Title 28 U.S. Code providing as follows:

> "§ *1255. Court of Claims; certiorari; certified questions*
>
> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant;"

It is not now clear whether this court will review with the full scope of the old equity review, apply the "clearly erroneous" rule to the findings of the Court of Claims, or the "substantial evidence" rule appearing in the amendment of May 22, 1939, quoted above.

The matter is discussed in Stern and Gressman's "Supreme Court Practice," (Bureau of National Affairs, Inc. (1950)). At page 43 the authors point out that Rule 52 (a) of the Rules of Civil Procedure doesn't apply to the Court of Claims. They then state "but since that rule was enacted as an embodiment of the best prior practice in reviewing findings of trial judges, the Supreme Court may apply it to Court of Claims cases despite the absence of any controlling statute or rule of Court. Although such a result would be reasonable, there can be no certainty as to the scope of review of Court of Claims findings under the new statute until the Supreme Court has spoken." (p. 43). We have been unable to find a decision of this Court clarifying the scope of such review since the above was written.

The Reviser's notes covering new section 1255 of New Title 28 of the United States Code appear in the annotations just subsequent to Section 1255 of Title 28, United States Code Annotated (West Publishing Co.) and are as follows:

"*Section 1255—Revised*

"Based on title 28, U.S.C., 1940 ed., § 288 (Feb. 13, 1925, ch. 229, § 3, 43 Stat. 939; May 22, 1939, ch. 140, 53 Stat. 752).

"Words 'including those begun under section 287 of this title' appearing in subsections (a) and (b) of section 288 of title 28, U.S.C., 1940 ed., were omitted as surplusage.

"The provision of subsection (a) of section 288 of title 28, U. S. C., 1940 ed., for review and determination of all errors assigned, 'with the same power and authority and with like effect, as if the cause had been

brought there by appeal,' was omitted as unnecessary. Review under this section is unrestricted.

"Provisions for authority to review, in addition to other questions of law, 'errors assigned to lack of evidence to sustain a finding of facts; that an ultimate finding or findings are not sustained by findings of evidentiary or primary facts; or that there is a failure to make a finding of fact on a material issue,' were omitted as unnecessary.

"Subsection (c) of section 288 of title 28, U. S. C., 1940 ed., was omitted as covered by the language at the beginning of the revised section.

"Changes were made in phraseology and arrangement."

(Title 28, Section 1255, United States Code Annotated, Reviser's Notes, p. 84.)

As is pointed out by Stern and Gressman (cit. *supra*) the Reviser's Notes fail to mention the deletion of the clause making the "substantial evidence" rule applicable to a review of findings of fact. The Reviser did not refer to this change and the explanation for it, if it was not inadvertent, has not been given. Note that the Reviser's note to § 1255 states that "Review under this section is unrestricted." Note that much of the language of the prior provision (28 U. S. C. (1946) § 288) was "omitted as unnecessary."

The effect of this statutory change should be determined so that the scope of future reviews will be known to the bar practicing before the Court of Claims.

Since the Court of Claims does not see and hear the witnesses and there is no intermediate appellate court, this court should afford the same scope of review to a Court of Claims review as the old equity review.

IV. We ask this Court to review the findings of fact attacked in our petition under "Questions Presented," No. 6, page — unrestrictedly. If, on the other hand, the substan-

tial evidence rule is still controlling, we ask the Court to hold that the findings of fact referred in our petition as 6(a), (b), (d), (e) and (f) be held to be not sustained by substantial evidence. Also that the ultimate finding of $80,000.00 for the Fleetwood's value is not sustained by the evidentiary findings.

The overwhelming evidence of all witnesses having knowledge of the facts substantiated the reproduction cost of $1,008,000.00 instead of $650,000.00 as found by the Court and a remaining useful life of the FLEETWOOD of 21 years instead of 16 years. It is difficult to ascertain how the Court arrived at a valuation of the FLEETWOOD of $80,000.00 on the evidence when the Commissioner found its value to be $107,700.00 (R. 254) and the overwhelming weight of the evidence showed it to be from $250,000.00 to $300,000.00.

With a finding by the court that a considerable outlay for repairs would be required to continue her operations for 16 years (FF. 17, R. 14) without a finding of the cost thereof, the Court of Claims deprived this Court of its full review. How could value be determined by the lower court itself without a finding on this fact?

With both parties agreeing that the average annual net earnings of the FLEETWOOD per year after overhead but not after depreciation for the five years just prior to requisition was $56,386.27 and with the 16 years remaining useful life found by the Court, the Court's determination of a value of $80,000.00 is clearly erroneous, and certainly is contrary to the overwhelming weight of the evidence.

On all the evidence such a finding amounts to a deprivation of petitioner's property without just compensation under the Fifth Amendment.

This also presents a case where the ultimate finding of the Court of Claims of $80,000.00 is not sustained by its evidentiary or primary findings. The Court also failed to

apply the test of what a willing buyer would pay a willing seller for a highly profitable facility (certainly income, profits and demand should receive serious consideration), instead apparently adopting some highly theoretical formula which is not apparent in the Court's findings of fact or conclusions. The Court of Claims' findings of fact appear to be identical with the Commissioner's, except that he found value at $107,700.00 and the Court reduced it to $80,000.00 (R. 15).

V. Court of Claims was in error in failing to make any finding of fact at all on important material issues.

Considering the 16 years of remaining useful life as found by the Court and the average annual net earnings for the 5 years just prior to requisiton of $56,386.27, a *very important and material question was the cost of making the repairs to the* FLEETWOOD necessary to allow her to continue to operate on the Great Lakes in the succeeding years of her useful life. As pointed out above in our petition under "Questions Presented," 7 (b), (c) and (d), (Petition D) the Court of Claims made no finding on this issue. The Court of Claims also failed to find what the value of the FLEETWOOD was at the time of requisition if in good sound operating condition at that time. It also failed to find the annual rate of depreciation of the FLEETWOOD or of a vessel like her on the Great Lakes and the percentage to be deducted from reproduction cost in using this method of ascertaining value. Although extensive alterations and conversions were made on the FLEETWOOD for wartime use on the Atlantic Coast in the coal trade immediately after requisition (FF. 15, R. 12) the Court of Claims made no finding as to how much of the money actually spent for such alteration, conversion and repair would have been necessary to continue the FLEETWOOD in her customary trade on the Great Lakes. It also failed to find what effect, if any,

there was in reducing the useful life of the FLEETWOOD of her use in brackish waters. But this presumably was taken into account before the 16 years remaining useful life was found.

Petitioner respectfully submits that full review of this case would show that the failure of the Court of Claims to make findings on material questions of fact was clearly erroneous, was error, deprived this Court of an opportunity for a full review and for a determination of the errors of the Court of Claims.

Conclusion

Petitioner therefore prays that this Court issue its Writ of Certiorari herein to the United States Court of Claims and that the judgment of the said Court of Claims rendered herein on the 6th day of February, 1951 be reviewed fully by this Court and reversed and remanded.

Respectfully submitted,

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JUNE 20, 1951.

APPENDIX "A"

Assignment of Errors Filed in Court of Claims

1. The judgment of the Court of Claims deprived petitioner of its Constitutional right under the 5th Amendment to just compensation for property taken in view of the Court of Claims finding of a remaining useful life of the Vessel FLEETWOOD of 16 years, and an annual net profit (audited by the respondent) on the FLEETWOOD's operation of $56,386.27 (after overhead but not depreciation) for the five years prior to requisition, and in view of the reduction by the Court of Claims in petitioner's recovery of just compensation for requisition by respondent based on FLEETWOOD's valuation of $80,000.00.

2. The Court of Claims erred in apparently disregarding entirely the annual average net earnings on the FLEETWOOD of $56,386.27 per year (after overhead but not depreciation) for the five-year period prior to requisition, in view of the 16 years of remaining life found by the Court and its valuation of only $80,000.00.

3. The Court of Claims findings of evidentiary or primary facts fail to sustain the ultimate finding by that Court of $80,000.00 as the valuation of the FLEETWOOD at the time and place of requisition.

4. The Court erred in failing to give effect to the general principle under the Constitution and Federal law that claimant for just compensation need not adapt any particular formula or any one fixed basis of proving the value of the requisitioned property.

5. There was a lack of substantial evidence to sustain the findings of fact by the Court of Claims to the effect that:

(a) The reproduction cost of the FLEETWOOD at the time and place of requisition was $650,000.00, instead of a minimum of $1,008,000.00;

(b) The remaining useful life of the FLEETWOOD at the time of requisition was 16 years, instead of 21 years;

(c) The useful life of a vessel like the FLEETWOOD on the Great Lakes of 55 to 60 years, instead of 60 years;

(d) No vessels closely comparable to the FLEETWOOD were constructed on the Great Lakes at or about the time of the requisition;

(e) The value of the FLEETWOOD at the time and place of requisition was $80,000.00, instead of $250,000.00 to $300,000.00;

(f) That a considerable outlay for repairs to the vessel would be required to continue her operation for 16 years on the Great Lakes.

6. The Court of Claims erred in failing to make any finding of fact on the following material issues:

(a) The effect in reduction of valuation or in reduction of useful life, if any, of her claimed operation in salt or "brackish" water until 1915 or 1916;

(b) How much of the amount spent by respondent in "repairing, altering and converting" after requisition was necessary to put the FLEETWOOD in operating condition;

(c) The cost of making the repairs to the FLEETWOOD which petitioner would have needed to make in the year or two immediately after the requisition in order to continue her in operation for her remaining useful life of 16 years;

(d) How much of the $394,472.61 spent in "altering, repairing and converting" by the respondent after requisition was for converting the FLEETWOOD for wartime use in the coal trade on the Atlantic Coast immediately after requisition;

(e) The value of the FLEETWOOD at the time of requisition if in good, sound operating condition, i.e., before necessary repairs;

(f) The annual rate of depreciation of a vessel in operation on the Great Lakes of approximately the age, type and condition of the FLEETWOOD and the percent to be deducted from reproduction cost of the FLEETWOOD in using this method of computing value.

7. The Court of Claims failed to apply the test of what a willing buyer would pay a willing seller for the FLEETWOOD.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 139

NICHOLSON TRANSIT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 4-19) is reported at 118 C. Cls. 344.

JURISDICTION

The judgment of the Court of Claims (R. 19) was entered on February 6, 1951. By order of the Chief Justice, dated May 4, 1951, the time within which to file a petition for a writ of certiorari was extended to June 22, 1951 (R. 20). The petition

for a writ of certiorari was filed on June 22, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the valuation of $80,000 which the Court of Claims assigned to petitioner's requisitioned vessel was so inadequate as to constitute a denial of just compensation as required by the Fifth Amendment.

STATEMENT

On June 17, 1942, the War Shipping Administration, acting under Section 902 (a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1254, 1255, 46 U.S.C. 1242), requisitioned petitioner's Great Lakes steamship *Fleetwood* (R. 4). In accordance with Section 902 (d) of the Merchant Marine Act, the War Shipping Administration determined on March 26, 1944, that just compensation for the vessel was $40,000. Petitioner rejected that offer and notified the War Shipping Administration that it elected to exercise its statutory right to receive 75% of the award without prejudice to its right to seek additional compensation. (R. 5.) Petitioner was paid $30,000 on May 21, 1945 (R. 5), and on October 27, 1947, instituted this suit in the Court of Claims alleging that just compensation for the requisitioned vessel was $300,000 (R. 1-3). The Court of Claims in-

creased the award to petitioner to $80,000, based on the following findings:

The *Fleetwood,* a single-screw bulk carrier with a steel hull and double bottoms, was built by the Superior Shipbuilding Company in 1903. She had an overall length of 247 feet, a breadth of 41 feet and a depth of a little more than 18 feet. Her gross tonnage was 1593 and her net tonnage was 1124. She was powered by a three-cylinder, triple expansion steam-engine with an indicated horsepower of 650 (R. 5).

Petitioner purchased the *Fleetwood* in 1934 for $6,000 and expended approximately $37,000 for alterations and improvements for the trade for which she was to be used[1] (R. 5). From the date of her purchase in 1934 until the requisition on June 17, 1942, petitioner operated the *Fleetwood* between Detroit and Cleveland, Conneaut and Buffalo as a bulk carrier of steel, scrap iron, coal and other commodities (R. 6).

The Court of Claims found that, at the time of the requisition, the machinery and mechanical equipment on the *Fleetwood* were those which had been originally installed in 1903, with the exception (1) of a generator, which had been placed on

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[1] Petitioner depreciated this cost of $43,000 at the rate of ten per cent, or $4,310.43 per year. At this rate, petitioner's investment would have been fully written off by the end of 1943, or about one and one-half years after the requisition (R. 5-6). As petitioner made no further capital investments in its vessel (R. 45), the book value of the vessel at the time of requistion must have been about $6,450.00.

the vessel in 1917, about 25 years prior to the requisition and (2) two mooring engines which had been added in the late 1920's, 15 to 18 years before the requisition. It further found that no major repairs had been performed on the engines or mechanical equipment since 1934[2] and that the vessel had not been repaired below the waterline since 1937, when she had been drydocked and inspected (R. 9-10).

As a result of the failure to maintain the vessel and because of the rough trade in which the vessel was operated, the court below found that, at the time of requisition, the hull structure of the ship was damaged and distorted; that the main transverses throughout the *Fleetwood*, with the exception of a few transverses amidship, were indented or bent, the distortion varying from slight to heavy;[3] that flanges were cracked and bilge bracket

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[2] The wearing parts had been renewed or replaced from time to time (R. 10).

[3] In a transversely framed vessel, such as the *Fleetwood*, the transverses are the principal structural members that support the shell plating and hold the plating in proper relation between the structural members. The main transverses are the keys to the structural strength of a transversely framed vessel. Smaller channels act as individual supports for the plating between the main transverses. Transverse brackets and flanges at the bottom of the channels hold them in position and tie them to the tank top and shell plating. A transversely framed vessel is designed with these key structural members fair and true and in a proper relationship to each other and to the portions of the vessel structure which they support. Deformation of, or damage to, a substantial number of these key members will cause progressive structural impairment throughout the vessel and, unless repaired to enable them to

support frames broken; that bulkheads at the forward peak were dished and their frames bent; that stringers in the aft bulkhead were bent and distorted; that shell plating was corrugated and indented from one-half to two inches throughout the vessel; that the tank top was dished between framing and longitudinal supports and the plating worn to about one-half of its original strength; and that examination of the underside of the tank top revealed loose rivets and a coating of rust (R. 11-12).

The court also found that vessels such as the *Fleetwood* ordinarily have a useful life on the Great Lakes of from 55 to 60 years, depending on the manner maintained, but that because she had been operated in salt and brackish water for about her first 13 years after her construction (R. 5), the *Fleetwood* could have a remaining life of 16 years (total life of 55 years) with considerable outlay for major repairs necessary (R. 14).[4] The court further found that, for the period 1937 through 1941, the *Fleetwood* was operated with an average annual net profit, after deducting overhead but before depreciation, of $56,386.27 (R. 8). Petitioner had three other vessels performing the

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serve the purpose for which they were constructed and designed, will ultimately result in structural failue of the vessel (R. 11).

[4] The United States requisitioned the *Fleetwood* for the purpose of using her as a coal carrier on the Atlantic Coast. After the requisition, the United States expended a total of $304,472.61 for repairing, altering and converting the *Fleetwood* for her intended purpose (R. 12).

same function as the *Fleetwood* and the Court of Claims found that the average earnings of all four vessels, for the period 1937 through 1941, before deducting depreciation, was $39,293.06 (R. 8).

Taking into account that there were no sales of vessels comparable to the *Fleetwood* near enough to the date of the requisition to establish the market price for such vessels at such time (R. 14), the reproduction cost of the *Fleetwood* on June 17, 1942, which it found to be $650,000 (R. 15), the condition of the vessel at the time of requisition, and the customary methods of depreciation and the capitalization based on earnings (R. 18), the court below concluded that the reasonable value of the *Fleetwood* at the time and place of taking was $80,000 (R. 19).

ARGUMENT

1. In an effort to find some practical standard for determining just compensation for property taken, the courts have usually adopted the concept of market value—what a willing buyer would pay to a willing seller. *United States* v. *Miller*, 317 U.S. 369, 374; *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402. Where, however, the peculiar circumstances make it impossible to determine a market value, "an owner's indemnity should be measured in various ways depending upon the circumstances of each case" and "no general formula should be used for the purpose." *United States* v.

Miller, supra at pp. 373-374. As this Court cautioned in *United States* v. *Toronto Nav. Co., supra,* at p. 402: "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."

In the instant case, the court below found (R. 14) and petitioner concedes (Pet., p. 17; R. 78) that there were no sales of vessels comparable to the *Fleetwood* sufficiently near the date of the requisition to establish a market price for such vessels. The lower court accordingly considered and weighed other pertinent factors as a means of determining the fair value of the requisitioned vessel. Thus, the lower court considered the reproduction cost of the vessel; its age; the condition of the vessel at the time of requisition; the fact that she had been operated for a number of years in salt or brackish waters; the original cost of the vessel to petitioner; the amounts expended upon repairs, replacements and alterations; the apparent years of useful life as indicated by the facts of the case; the fact that while it was in operating condition for the Great Lakes, it was in need of major repairs; and that repairs and replacements would probably be greater during the remaining years of the life of the vessel than in the previous years. The court also considered the customary methods of depreciation and the evidence offered as to value based on capitalization of earnings. Only after considering these factors

did the court arrive at the reasonable value of the requisitioned vessel (R. 18-19).

It is respectfully submitted that the record supports the Court of Claims' conclusion that $80,000 is sufficient compensation for the vessel requisitioned.[5]

2. Petitioner in effect contends that the court below should have given controlling weight to the profits received from the operation of the *Fleetwood*. Although earnings of requisitioned property are often a factor to consider in determining just compensation or market value, it is submitted that such earnings are not entitled to the weight which petitioner seeks to have the Court accord them. In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 5, this Court stated: "The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent." A separation must thus be made between the value of property and the value of the

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[5] In *United States* v. *Toronto Nav. Co.*, *supra*, Mr. Justice Frankfurter, in a concurring opinion, stated, at p. 408: "If a jury is to make the valuation [of the property of requisitioned] the area within which speculation may in the nature of things roam at large should be as narrowly confined as possible. * * * But when the valuer is a court and particularly the tribunal that consists of judges to whom may fairly be attributed the expertness that comes from frequent dealing with the more exclusive problems of value, it seems desirable for this Court to allow such tribunal considerable freedom from hard and fast rules in determining what data are relevant and what significance may be drawn from them."

claimant's own business skill. *United States* v. *Toronto Nav. Co., supra* at p. 403, note 6. As stated by the court below in *Wilson Line, Incorporated* v. *United States,* 111 C. Cls. 764, 784:

> The earning capacity of the ship at the time of the taking or the profits which have been previously earned are some evidence tending to prove value, but the varying facts of use, business acumen, and management which go to influence this factor, detract from the weight which should be given to this element.

In the instant case, the earning power of petitioner's vessels was due, in large measure, to the astute business management of petitioner and its affiliated companies. The business of petitioner and its affiliated companies had been built up over a period of years under the guidance of men who had been engaged in lake operations for many years (R. 6, 18). Because of able management and coordinated operations, petitioner and its affiliated companies enjoyed a profitable business in the lake area. The Government, however, did not requisition the business acumen and management of petitioner and its affiliated companies. Nor could the Government requisition the earnings of the *Fleetwood.* The trade in which the *Fleetwood* was engaged was peculiar to the company rather than to the vessel. What the Government took and what it is required to pay for is the value of the *Fleetwood* in her condition at the date of requisi-

tion.[6] To fix just compensation for the vessel upon the basis of the owner's earnings from a particular use of the vessel, rather than upon its transferable value as a vessel, would be to permit petitioner effectively to recover for loss of future profits, contrary to the established rule that loss of future profits is not an element of just compensation. Cf. *United States* v. *General Motors Corp.*, 323 U.S. 373, 379; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89; *Mitchell* v. *United States*, 267 U.S. 341; and see specifically Section 902 (a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1254, 1255, 46 U.S.C. 1242(a)).

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[6] There can be no doubt that the vessel's maximum use, minimum repairs and resultant high earnings were directly reflected in her damaged and distorted hull structure to which major repairs were necessary to place her in sound condition. These "varying facts of use" to which the Court referred in the case of *Wilson Line*, *supra*, are facts which detract from the weight to be given earnings as an element of value. To attach any weight to the high earnings of the *Fleetwood* as a measure of just compensation is to permit the petitioner, on the one hand, to gain the advantage of high earnings procured as a result of the depletion of the physical property and then to recover, on the other hand, for the depleted physical asset on the basis of the earnings procured from its depletion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 139

NICHOLSON TRANSIT COMPANY,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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At the outset would say that the petitioner feels that the matters set forth in the petition for writ of certiorari to the Court of Claims, and the brief in support thereof, contain ample justification for the granting of the writ and for full hearing of the matter before this Honorable Court.

There are, however, several matters set forth in the brief for the United States in opposition which, it is felt, should be called to the attention of the Court.

On page 4 of that brief, it is stated in part:

> "As a result of the failure to maintain the vessel and because of the rough trade in which the vessel was operated, the court below found * * *."

It is felt that the Court below did not find that the vessel had not been maintained. The vessel had been used for 39 years, and it is most natural that the hull of the ship would in places be distorted, varying from slight to heavy. The Court did find that the ship had a current certificate from the United States Coast Guard and from the American Bureau of Shipping and was in operation on the Great Lakes at the time of her requisition. The Court below did find, without defining the nature of the repairs or the cost thereof, that with a considerable outlay for repairs the vessel would have a remaining useful life of 16 years from June 17, 1942. The vessel was operated in the condition in which she was maintained at an average annual net profit after deducting for overhead but before depreciation of $56,386.27 (R. 8).

With reference to page 6 of the brief of the United States, the Court below refers to the "customary methods of depreciation and the capitalization based on earnings," (R. 18) without any explanation as to what is meant by either the "customary methods of depreciation" or the "capitalization based on earnings." It is felt that specific findings should have been made as to what the Court meant by "customary methods of depreciation and the capitalization based on earnings."

The vessel, as the Court found, had been maintained and repaired so as to maintain a class for the particular trade in which she was engaged, and there is nothing in the record, nor is there any specific finding, that any major repairs or replacements would have been necessary for the vessel to have continued in use on the Great Lakes.

With respect to Argument 2, page 8, we wish to make it plain that petitioner is not contending that the Court below should have given controlling weight to the operation of the FLEETWOOD. Petitioner is arguing that in view of an average annual net profit, after deducting for overhead but before depreciation, of $56,386.27 for the five years immediately prior to taking, that the Court below must have, in view of its findings of a remaining life of 16 years, given little or no weigh to the earnings of the property which was requisitioned. It is also argued in the brief, pages 8 and 9, that a separation must thus be made against the value of the property and the value of the claimant's own business skill. There is no evidence whatever in the Court's findings or its conclusions as to any unusual business skill of the petitioner, except that it was found it was a well-managed company.

The Court specifically found in Finding No. 7 (R. 8) in part as follows:

> "* * * Her carrying capacity was (fol. 12) 2,500 tons, exclusive of bunkers and stores. She had an operating speed of about 10 miles an hour and consumed about one-half ton of coal per hour of operation. Although at times she transported other commodities, she was principally used by plaintiff for hauling steel and scrap iron. Her deckhouses were located fore and aft so that there was a clean sweep of deck between them. Because of her 65-foot hatches and low sides, she could be loaded and unloaded more quickly and more econo-

> mically than a larger vessel having a deeper draft and higher sides. She was small enough to pass through the Welland Canal and her shallow draft enabled her to reach steel mills and docks where there was very little water. Since the vessel was small and her cost of operation low, she was useful for moving commodities on trips for which plaintiff was unable to secure a full load and she was able to give plaintiff's customers better service through more frequent sailings." (R. 6-7.)

Here we have a vessel which, because of her peculiar characteristics and the fact that she was used primarily in a particular area, namely Detroit to Lake Erie ports on short runs, that she was well adapted for the trade.

Later, and under paragraph 2 of the Argument, at page 9 an effort is made to read into the record that in addition to the petitioner's astute business management, that its affiliated companies in some way contributed to earnings of the FLEETWOOD.

There is nothing whatever in the record to bear this out, the findings being to the effect that the relationships between the petitioner, Nicholson Transit Company, and the Nicholson Terminal & Dock Company were no different than between other companies (R. 7, 8). It is also argued that because of the able management and coordinated operations, petitioner and its affiliated companies enjoyed a profitable business in the Lake area. Here again the record is completely barren with respect to the earnings of any so-called affiliated company or that the earnings of the petitioner were in any way attributable to coordinated operations between petitioner and its affiliated companies.

Petitioner readily agrees that the Government did not requisition the business acumen and the management of the

petitioner and its affiliated companies, nor did the Government requisition the earnings of the FLEETWOOD. The earnings of the FLEETWOOD were not peculiar to the company rather than to the vessel, and there is nothing in the record to indicate this. In fact, the Court's finding previously referred to and quoted above (R. 6-7) clearly indicates that she was a vessel which was peculiarly adapted to the trade in which she enjoyed very profitable earnings averaged over the five years prior to taking. What petitioner is arguing is that little, if any, weight was given to the earnings of property of which the petitioner was deprived. Likewise, if the vessel had a useful life of 16 years as found by the Court below, then certainly less than two years' earnings does not constitute just compensation.

We have discussed in our principal brief the case of *United States v. Toronto Navigation Co.*, 338 U. S. 396, 402. In that case the Court of Claims, at 81 F. Supp. 237, 244, stated in part:

> "* * * In view of all the circumstances we are compelled to resort to a consideration of the earnings of the MAITLAND NO. 1 during the time that the vessel was actually operated as a carferry. * * *"

It is respectfully submitted that not only the Court of Claims, but counsel for the Government, have misinterpreted that case. This Court said at 338 U. S. 403 with respect to that specific question:

> "And past earnings are significant only when they tend to reflect future returns. We see no relevance in the MAITLAND'S earnings between 1916 and 1932 on the issue of capacity to earn after 1942, on the Great Lakes or elsewhere. On this record they are entirely too remote to bear on the vessel's value when taken." (Page 403.)

It is further argued on page 10 of the brief that to fix just compensation for the vessel upon the basis of the owner's earnings from a particular use of the vessel rather than upon its transferable value as a vessel would be to permit petitioner effectively to recover for loss of future profits contrary to the established rule that loss of future profits is not an element of compensation.

Neither of the three cases there cited has any similarity upon the facts to the present case. Here a property was requisitioned for title. What counsel for the Government are here in effect arguing is that immediate prior earnings should not be an element in the determination of just compensation. In this respect we would respectfully refer the Court to the citation on page 22 of petitioner's main brief, and the quotation from the *Monongahela Navigation Co. v. United States,* 148 U. S. 312, at page 328. Because of the argument made in the Government's brief, we desire even at the expense of repetition to quote somewhat more fully from that case:

> "* * * What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness,—the profits which its use brings to the owner. Various elements enter into this matter of value. Among them we may notice these: Natural richness of the soil as between two neighboring tracts. One may be fertile, the other barren; the one so situated as to be susceptible of easy use, the other requiring much labor and large expense to make its fertility available. Neighborhood to the centers of business and population largely affects values, for that property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental. Demand for the use is another factor. The commerce on the Monongahela river, as appears from the testimony of-

> fered, is great; the demand for the use of this lock and dam constant. A precisely similiar property, in a stream where commerce is light, would naturally be of less value, for the remand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others the owner is entitled to a reasonable compensation, and the number and amount of such uses determines the productiveness and the earnings of the property, and, therefore, largely its value. * * *"

With respect to footnote 6 at the bottom of page 10 of the answered brief, there is no evidence in the record to indicate that the vessel's high earnings were due to lack of any kind of repair or maintenance required and the use to which the vessel was put. The vessel was in a rough trade and, admittedly, after 39 years of use was not in the condition of a new vessel. This fact was no doubt taken into consideration in the Court's determination that her remaining life was only 16 years. Had she been in the same condition as when built, she then, of course, would have had a life according to the Court's findings of some 55 to 60 years.

Respectfully submitted,

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